(15) (14)

Nos. 94-1893, 94-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

C & P TELEPHONE CO. OF VIRGINIA, *et al.*
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF METS FANS UNITED/VIRGINIA CONSUMERS FOR CABLE CHOICE, ALEXANDRIA FEDERATION OF CIVIC ASSOCIATIONS, TELEVISION VIEWERS OF AMERICA, VIRGINIA ASSOCIATION OF THE DEAF, NORTHERN VIRGINIA RESOURCE CENTER FOR DEAF AND HARD OF HEARING PERSONS, UNITED HOMEOWNERS ASSOCIATION, AND VIRGINIA PUBLIC INTEREST COALITION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

With the consent of the parties,[1] *amici curiae* METS Fans United/Virginia Consumers for Cable Choice, *et al.*, hereby submit this brief in support of respondents. *Amici* are a coalition of consumer groups which support elimination of § 533(b) to promote diversity in media voices, competition in the cable television market, and access to video programming for people with disabilities. *Amici* represent a wide range of organizations and consumer interests:

METS Fans United/Virginia Consumers for Cable Choice is an association of cable television consumers who believe that lifting § 533(b) and permitting Bell Atlantic to provide video programming in the Alexandria market will open up competition with the incumbent cable operator and provide viewers with access to alternative programming sources.

The Alexandria Federation of Civic Associations, Inc. is a not-for-profit organization whose membership includes 75 civic, condominium and apartment associations in the City of Alexandria. The Federation believes that eliminating § 533(b) will promote cable competition in the City of Alexandria and increase the public's access to alternative programming sources and government and public access channels.

Television Viewers of America is a grassroots consumer organization actively pursuing legal and regulatory initiatives to bring nationwide competition to multi-channel video programming and lower rates and better service to consumers.

Virginia Association of the Deaf, Inc., is a non-profit association whose goals are to serve the deaf and promote their unique needs in legislation, education, communication, health care, research, rehabilitation and individual family counseling. The Association believes that a favorable decision in this case will provide greater access to telecommunications and programming services that meet the needs of the deaf.

Northern Virginia Resource Center for Deaf and Hard of Hearing Persons is a not-for-profit social service agency serving

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[1] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

deaf persons and those with hearing difficulties, their families, friends and other professionals. The Center believes that the increased competition offered by local telephone companies can increase access to video programming for deaf and hard of hearing persons.

United Homeowners Association is a non-profit association whose goal is to inform and represent homeowners across the country. UHA believes that the competition from telephone companies in the provision of cable television programming services will increase consumer choices and lower cable rates.

Virginia Public Interest Coalition is an informal group of individuals and organizations concerned about the public interest and telecommunications in Virginia. The coalition works to ensure that a consumer voice representing the interest of educators, the elderly, people with disabilities, workers and others is heard during the public debate on telecommunications issues. The Coalition believes that lifting § 533(b) will result in increased competition in the provision of cable television services, lower prices and greater access to programming services.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has frequently stressed that the First Amendment protects not simply the right of a speaker to *speak*, but also the right of the audience and the public to *hear*. Yet § 533(b), by barring willing speakers from communicating with willing listeners, runs roughshod over this fundamental principle of free speech.

The First Amendment issue presented here is not some academic nicety. It is the very real question of whether millions of potential viewers will be prevented from fully participating in the most important medium of communication today. During both the Bush and Clinton Administrations, every federal agency with responsibility for fashioning telecommunications policy has recommended that § 533(b) be eliminated. In particular, the Federal Communications Commission (FCC) has predicted that allowing competition by telephone companies in video

programming would expand subscribership by 11.2 million households nationwide and produce annual consumer benefits of some $5.36 billion.

In determining whether § 533(b) could survive intermediate scrutiny, the Court should pay particular attention to the historical record compiled by the federal agencies involved in enforcing this statute, which demonstrates its patent unconstitutionality.

ARGUMENT

I. SECTION 533(b) VIOLATES FREE SPEECH RIGHTS BY BARRING WILLING SPEAKERS FROM COMMUNICATING WITH WILLING LISTENERS

Audiences have a right under the First Amendment to receive programming by local telephone companies, and this right is independent of the right of telephone companies to speak. This Court has frequently recognized that First Amendment rights belong to recipients — or potential recipients — of speech as well as to the speakers themselves. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), for example, this Court determined that the First Amendment rights of the public to receive information provided an independent legal basis for consumers to challenge government regulation of speech. This Court observed that it "is clear from the decided cases" that the First Amendment protects the "right to 'receive information and ideas.'" *Id.* at 756-57 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972)). The Court has since reiterated that "the extension of First Amendment protection" may be justified by the value to consumers and the public "of the information that such speech provides." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).[2]

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[2] *See also Lamont v. Postmaster General*, 381 U.S. 301 (1965) (upholding First Amendment rights of citizens to receive political publications from abroad, from foreign speakers whose ability to invoke the First Amendment was open to question); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (sustaining worker's

Even where a would-be speaker, rather than a listener or viewer, is the actual party challenging a law under the First Amendment, the speaker is entitled to invoke the *public's* right to a diversity of information sources. "The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). In *First National Bank*, this Court permitted a business corporation to challenge a prohibition on speech not because of the First Amendment's role "in fostering individual self-expression," but rather because of "its role in affording the public access to discussion, debate, and the dissemination of information and ideas." *Id.* at 783. This Court added that "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit the government from limiting the stock of information from which members of the public may draw." *Id.*[3]

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2458 (1994);

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right to meet, discuss, and be informed of impending election for collective bargaining agent); *Martin v. Struthers*, 319 U.S. 141, 143 (1943) ("this freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it"); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society.").

[3] In this case, the diversity principle does not support the constitutionality of § 533(b). In fact, that principle undermines the statute. In the Court of Appeals, *amici* addressed the question of whether the principle of diversity in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"), supported § 533(b). *See* Br. of METS Fans, *et al.* in Ct. App. 17-22. *Amici* noted that the restriction in *NCCB* prevented broadcasters from purchasing a newspaper and thus eliminating an additional voice. Section 533(b), by contrast, prohibits a telephone company from adding its voice by becoming a cable provider. This is not a cross-ownership case.

see also Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993) ("the general rule is that the speaker and the audience, not the government, assess the value of the information presented").

II. FEDERAL TELECOMMUNICATIONS AGENCIES HAVE DETERMINED THAT SECTION 533(b) IS ANTICOMPETITIVE AND HARMS CONSUMERS

The First Amendment right to receive information is particularly salient here, for every federal telecommunications agency has urged elimination of § 533(b) on the ground that it is anticompetitive and harms consumer interests.

The court below evaluated the constitutionality of § 533(b) under "the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech." *Turner Broadcasting*, 114 S. Ct. at 2469. This standard of review requires the Government to establish that the measure challenged on free speech grounds: (1) is narrowly tailored to achieve substantial government interests; and (2) leaves open ample alternative channels for communication. *See, e.g., Ward v. Rock Against Racism, Inc.*, 491 U.S. 781, 789, 799 (1989). Both of these inquiries rest in part on an assessment of the purported justifications for the challenged measure, and thus can be advanced by an examination of legitimate, reliable information that bears upon these independent prongs of the "intermediate scrutiny" standard.

In providing guidance to the courts about the legitimate sources that they should consult and consider in undertaking these evaluations, this Court has begun with an important cautionary reminder: any court exercising the power of judicial review of the constitutionality of a statute has an "obligation to exercise independent judgment when First Amendment rights are implicated." *Turner Broadcasting*, 114 S. Ct. at 2471. The exercise of independent judgment is critical in determining whether the Government has carried its burden of demonstrating "that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 2470.

With this fundamental point established, however, the next step is to decide what sources provide legitimate material that will aid in exploring the two basic prongs of intermediate scrutiny. Here, this Court has stressed the importance of identifying sound information for the purpose of conducting these twin inquiries, observing that the Government cannot carry its burden under the First Amendment by offering "mere speculation and conjecture." *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995). "[R]ather, a governmental body seeking to sustain a restriction" against a First Amendment challenge "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 113 S. Ct. at 1800. Casual submissions based on "anecdotal evidence and educated guesses" are insufficient bases on which to restrict free speech rights, and "litigating positions," such as those belatedly put forward by the Government in this case, cannot be used as reliable "proof that the Government's regulation is necessary." *Rubin*, 115 S. Ct. at 1593.

When the Government agencies charged with enforcing a given prohibition on speech have all concluded it is not essential to further any substantial government interest — and, indeed, that it positively disserves any such interests — it is difficult to imagine that the law could survive any form of First Amendment scrutiny. This Court has often attached weight to factual findings by responsible policymakers that undercut the validity of a restriction on speech. *E.g.*, *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 130 (1989); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n.7 (1974). The situation here is much starker than anything this Court has encountered before: every agency participating in the formation of telecommunications policy that has examined § 533(b) has concluded that it retards competition and injures consumers. By their own statements, the relevant Government agencies have already established that they cannot meet their burden under the First Amendment of justifying § 533(b). To take those agencies at their word entails no "second-guess[ing] [of] the Government's judgment." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 478 (1989).

To be sure, purported administrative "findings" would be suspect if they were unaccompanied by objective indicia of reliability, such as internal consistency and factual completeness. Similarly, they would be entitled to little or no weight if they were made for the purposes of litigation or reflected inconsistencies in approach or a self-interested concern in extending and protecting the scope of the agency's own authority in a particular sphere. *See, e.g.*, *Watt v. Alaska*, 451 U.S. 259, 273 (1981) (agency position inconsistent over time is "entitled to considerably less deference" than a consistently held agency view); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 386 (1988) (Brennan, J., dissenting) (deference to agency position must take into account consideration of the agency's "institutional interests in expanding its own power").

But those caveats are not applicable here. Federal telecommunications policymakers have *unanimously* condemned § 533(b) as anticompetitive and anti-consumer. They have done so on the basis of a comprehensive historical record that reflects the modern development and growth of the American telecommunications industry. This striking conclusion about the counterproductive consequences of § 533(b) has been consistent across the different federal agencies involved in this area even though, from the perspective of the agencies' narrow self-interest in expanding their own enforcement authority, invalidation of this measure likely would restrict that authority. This broad consensus that § 533(b) is entirely disconnected to any significant government interest is thus entitled to special weight in this Court's constitutional examination of whether this statute can satisfy the two distinct prongs of intermediate scrutiny. And the following examination clearly shows that § 533(b) is not "narrowly tailored" to accomplish *any* legitimate government interest.

1. For years, the FCC has explained that its position on the inefficacy of § 533(b) is based on its considered judgment that "competition provided by telephone companies can be expected to provide . . . lower costs and greater choices for consumers and greater responsiveness to consumer demand by service providers." *Telephone Company-Cable Television Cross-Ownership Rules*, 3

FCC Rcd 5849, 5857 (1988) (quoted at J.A. 341). The evidence compiled by the Commission almost a decade ago demonstrated "that the prohibition against telephone companies providing cable television service within their telephone service areas no longer serves the public interest. . . . The ban directly deprives consumers of video programming services telephone companies could provide [and] prevents market incentives and achievement of efficiencies that could bring additional services to the public." *Id.* at 5866 (quoted in J.A. 341).

As the evidence has accumulated, the FCC has become increasingly emphatic in stating its position that § 533(b) does not serve the public interest and does not advance any legitimate government interest. In 1992, it issued a further report and order, in which it determined that removing § 533(b) would "increas[e] competition in the video marketplace, spur[] the investment necessary to deploy an advanced infrastructure, and increas[e] the diversity of services made available to the public." *Telephone Company-Cable Television Cross-Ownership Rules*, 7 FCC Rcd 5781, 5847 (1992) (quoted at J.A. 337). After reviewing the evidence that had been amassed in the formal administrative record, the Commission recommended that Congress abolish the prohibition on telephone companies providing video programming "directly to subscribers in their telephone service areas." *Id.* As the Commission explained: "permitting local telephone companies to directly provide video programming will further increase diversity, as they will add another programming voice to those which now exist. . . . Most importantly, we find that the public will benefit greatly from the resulting increased competition in the video marketplace." *Id.* at 5849-50 (quoted at J.A. 338).

In May 1995, in its most recent report and order on the subject, the FCC formally reiterated its position that "authorizing telephone companies to provide video programming" would "promote competition in the multi-channel video programming market." Govt. Supp. Br. App. 5a. "Since 1970, . . . the cable industry has grown from a fledgling service to a more mature industry that now serves a majority of households and 'has replaced over-the-air broadcast teleision the primary provider of

video programming.'" *Id.* at 11a. "These developments have . . . mitigated to a fair degree the competitive concerns that led the Commission and Congress to adopt the cross-ownership ban." *Id.* at 12a.

The Commission has even gone so far as to quantify the tremendous benefits that would be attained by lifting the statutory ban on video programming by telephone companies. According to the FCC's own statistics, eliminating § 533(b) "would result in significant price savings for consumers and stimulate provision of a range of new information services," with rates falling about 20 percent and subscribership increasing by 11.2 million households nationwide. Report of the Federal Communications Commission Regarding the President's Regulatory Reform Program 16 (Apr. 28, 1991) (quoted at J.A. 339-40). The Commission has predicted that competition would produce annual consumer gains of $5.36 billion, not counting "the significant gains in innovative uses of broadband communications in non-entertainment markets, such as health care, education, and telecommuting, all of which are very likely to follow from enhanced capacity and competitiveness in the supply of cable television services." *Id.* (quoted at J.A. 340).

The current Chairman of the FCC, Reed E. Hundt, summarized the Commission's official position on the counterproductive nature of § 533(b) in congressional testimony delivered on January 27, 1994:

> Direct, facilities-based competition between cable and telephone companies will produce *substantial benefits for the American public*. Competition in this market will spur the deployment of advanced technologies that are capable of delivering the full range of services that customers demand. These services include not only entertainment services, but also the growing number of *educational, health, and social services that are accessible over broadband technologies*.
>
> In addition, competition in this market can be expected to produce the same positive results for consumers that we

have in other markets for telecommunications services that have undergone the transformation from monopoly to competition: *technological and service innovation, lower prices, and responsiveness to consumer tastes*. Telephone company entry also will *expand the electronic marketplace of ideas* by creating new outlets for video service providers.

* * *

Elimination of the existing cross-ownership restriction should stimulate new telephone company investment in facilities that are capable of delivering video and advanced telecommunications services. *Consumers should be the beneficiaries of the expanded choices that facilities-based competition in this market will foster.*

J.A. 376-77 (emphases added). He thus maintains the same position as the former Chairman of the FCC, James H. Quello, who also agreed that the removal of § 533(b) would "bring consumers lower rates, more responsive customer service, and greater choice of video programming sources." Letter from James H. Quello, FCC Chairman to Hon. Edward J. Markey (Mar. 1, 1993) (quoted at J.A. 338-39).

In short, the FCC has built an overwhelming administrative record that § 533(b)'s direct ban on video programming by telephone companies within their service areas is entirely counterproductive and thus does not serve any government interest.[4]

[4] Experience tends to support the FCC's conclusions. For example, many cable operators raised rates, re-tiered channels, or otherwise altered their service just as congressionally mandated rate regulation took effect, in the form of the Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1460. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Second Order on Recon., 9 FCC Rcd 4119, 4166 (1994). Subsequently, the FCC found that about 30 percent of the cable systems had raised regulated rates, even under the 1992 Cable Act. Cable Services Bureau, *FCC Cable Regulation Impact Survey, Changes in Cable Television Rates Between Apr. 5, 1993-Sept. 1, 1993*, at 3 (Feb. 22, 1994). A notable exception was the City of Alexandria, Virginia, in which the incumbent cable operator — facing the prospect of head-to-head competition from Bell Atlantic — actually decreased its rates by more than 10 percent. *See* Hong, *Cable Rates Drop in Alexandria*, Washington Post, Sept. 9, 1993, at V-1.

2. The Department of Justice has similarly concluded that removing § 533(b) "will allow another competitor to enter the video programming market, . . . increase the [telephone companies'] willingness to take the financial risk of developing broadband integrated networks, [and] make them more effective competitors."[5] It has also determined that telephone companies' "provision of video programming will have procompetitive benefits that outweigh any anticompetitive risks involved," and thus they "should be allowed to own and directly provide video programming."[6]

The Department thus has consistently urged Congress to do away with § 533(b), which is counterproductive of its actual objectives. In 1991, the Assistant Attorney General for the Antitrust Division, together with the Secretary of Commerce, stated their position in these words: "We think that Congress can best serve television viewers by removing barriers to entry by new firms into the video services marketplace. The Administration therefore supports removal of current legislative prohibitions against telephone company provision of video programming." Letter from James F. Rill, Assistant Attorney General, Antitrust Division and Robert A. Mosbacher, Secretary of Commerce to Hon. John C. Danforth (Mar. 13, 1991) (quoted at J.A. 343). In congressional testimony presented on January 27, 1994, Anne K. Bingaman, Assistant Attorney General for the Antitrust Division in the new Administration, reaffirmed the Department's views:

[5] Reply Comments of the United States Department of Justice before the Federal Communications Commission, *Telephone Company-Cable Television Cross-Ownership Rules*, CC Dkt 87-266 at 44-45 (Mar. 13, 1992) (quoted at J.A. 342).

[6] *Id.* (quoted at J.A. 342).

"The Administration . . . strongly endorses the provisions of H.R. 3636 that would permit existing cable and telephone companies to offer both video and telephonic services in the same geographic areas. . . . It is crucial that public policy promote competition between methods for delivering telecommunication services." J.A. 381.

3. These conclusions have also been independently confirmed by the National Telecommunications and Information Administration (NTIA), a unit of the Department of Commerce that is responsible for telecommunications policy. The NTIA has determined that:

> In general, government restrictions that have the effect of limiting the uses to which new technology can be put tend to be inefficient and anticompetitive, and retard investment in that new technology. In particular, we believe that the current cable/telco crossownership rules are having such an effect wth respect to investment in broadband public network technology.

NTIA, TELECOMMUNICATIONS IN THE AGE OF INFORMATION 235 (1991) (quoted at J.A. 344). The NTIA has also stated that "the likely benefits of LEC [local exchange carrier] entry into the video programming business outweigh the potential costs of LEC provision of video programming," and that "[t]he opportunity to provide programming should increase LECs' incentives to construct integrated broadband network facilities to carry that programming to the home. This, in turn, could lead to introduction of a wide range of innovative voice, data, and video services for subscribers." *Id.*

In 1992, the NTIA reiterated its documented concerns "about the continuing wisdom of this restriction" on video programming contained in § 533(b), and noted that "we have repeatedly advocated its elimination."[7] As the NTIA explained again in more

[7] Reply of the National Telecommunications and Information Administration, *In Re Teleport Communications — New York*, File No. 13135-CF-TC(3)-92, at 3 (May 27, 1992) (quoted at J.A. 346).

detail: "Allowing telephone companies to provide video programming in their local service areas would significantly increase competition in the video services market, which would, in turn, yield lower prices to viewers, better service quality, and better programming diversity." *Id.* In January 1994, this view was reaffirmed in congressional testimony by Larry Irving, Assistant Secretary of the Department of Commerce for Communications and Information. J.A. 382, 383.

4. Finally, in January 1994, the Clinton Administration released its "White Paper on Communications Act Reforms," which outlined the Administration's proposal to remove § 533(b) on the ground that the statute is merely an undesirable obstruction to the important goal of securing and promoting competition in the telecommunications industry. As the White Paper states the matter: "Although the existing cable-telephone company cross-ownership restriction of the 1984 Cable Act may have been appropriate when enacted, today it is an unnecessary and artificial barrier to competition in the delivery of video programming to American consumers and to investment in advanced local infrastructure." J.A. 370.

Taken together, these statements represent an impressive and extremely thorough historical record, which establishes that § 533(b) does not advance any legitimate government interest. Instead, the administrative record compiled by these federal officials establishes that § 533(b) runs counter to the most important objectives of established governmental policy toward this industry, even as it imposes direct and substantial restrictions on free speech. This conclusion, moreover, has been reached by *all* of the officials who are charged with exercising responsibility across the entire spectrum of federal authority to set national telecommunications policy. The sound expertise reflected in the historical record compiled by these officials, which plainly shows that the very statute they are authorized to administer and enforce is *counterproductive* and affirmatively hinders the government's asserted interest, warrants very close examination by this Court in assessing the validity of § 533(b). On the basis of this record, it

is simply impossible to conclude that § 533(b) is "narrowly tailored" to serve that interest.

III. THE ANTICOMPETITIVE EFFECTS OF SECTION 533(b) ARE FELT BY MILLIONS OF POTENTIAL VIEWERS

A law that shuts out millions of consumers from the Nation's most important medium of expression cannot be deemed to leave adequate alternative channels of communication open to the public. Section 533(b) relegates a telephone company to three "alternative" means of expression, which are completely unsatisfactory from the standpoint of the consumer interests of the public: (1) video programming *outside* its telephone service area; (2) *non*-video programming forms of speech; and (3) the creation of video programs distributed in-region by local broadcasters, cable operators, or video stores, *outside the telephone company's editorial control*.

Whether or not these alternatives are "ample" as to the telephone company speaker (and we believe that they are not), they plainly are inadequate from the perspective of the *public*. The first option, programming outside the region, is no alternative at all for consumers who are located within the telephone company's service area. Out-of-region programming involves an entirely different audience. Members of the public are not fungible, and the protected rights of one audience cannot be denied on the ground that the speaker can address a different audience instead. *See Schneider v. State*, 308 U.S. 147, 163 (1939).

Nor do the in-region "alternatives" offer consumers any meaningful substitute. To be sure, § 533(b) allows telephone companies to publish newspapers or distribute handbills, but in the modern age of telecommunications, video programming has become the public's primary source of news and information. Millions more people have televisions than subscribe to newspapers, and the average television household watches television seven hours per day, and the average resident spends almost ten times as many hours watching television as reading the

newspaper. *See* J.A. 196-97 (Stipulated Facts 10-14). Moreover, the "power to communicate ideas through sound and visual images . . . is significantly different from traditional avenues of communication because of the immediacy of the medium." *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) (quoting FCC Report and Order), *cert. denied*, 482 U.S. 919 (1987).

Similarly, the in-region distribution of telephone company speech by cable operators and broadcasters, at the discretion of these existing owners, is certainly no adequate substitute from the perspective of consumers. The fact is that there is already far more video programming than these incumbent cable operators can possibly carry. Cable operators currently have an average capacity of about 40 channels. J.A. 198 (Stipulated Fact 20). Yet there are already available many more sources of programming: local broadcast stations, more than 75 basic cable networks, 42 regional networks, 7 pay networks, 7 pay-per-view networks, and other text and audio services. J.A. 144-45 (Affidavit of William E. Lee ¶¶ 6(a), 6(b)). Accordingly, the Government has stipulated in this case that "[c]urrently, the supply of available video programming exceeds the available channel capacity of almost all cable systems." J.A. 198 (Stipulated Fact 19).

Furthermore, if independent video programmers are to reach their audiences and expand the diversity of information available to the public, they need the very editorial support and coordination that § 533(b) forbids telephone companies from providing. Thus, it was undisputed in the courts below that, as a prominent independent video producer explained, "[i]ndependent video producers and media artists are producing much more video programming than is currently being distributed on existing systems. As long as show producers and distributors stand as 'gatekeepers' for the viewing audience, voices that do not conform to the video carriers' needs will not be heard." J.A. 324 (Affidavit of Robin Smith ¶ 6). Telephone companies' "ability to package, market, and distribute video programming for access on demand presents new opportunities for independent producers and media artists to reach a much larger audience." *Id.* (at ¶ 7).

Lifting § 533(b) would thus permit a wide range of new voices to be heard:

> A new genre of programming will emerge, utilizing the new interactive technologies in ways that are more responsive to the needs of individuals. . . . With more distribution outlets, small independent and non-profit producers will gain a precious commodity — a platform for *diverse voices and visions that can be shared with the broadest possible audience.*

Id. (at ¶ 8) (emphasis added).

This effect of removing § 533(b) is also borne out by the historical record compiled by the federal agencies, as described in more detail above. The NTIA, for example, has urged that "the availability of broadband facilities will likely spawn new applications — video and non-video alike — as entrepreneurs and carriers devise new service offerings that will benefit the American public." NTIA, TELECOMMUNICATIONS IN THE AGE OF INFORMATION 234 (1991) (quoted at J.A. 344-45). "This, in turn, could lead to introductions of a wide range of innovative voice, data, and video services for subscribers." *Id.* at 235 (quoted at J.A. 344). The White Paper similarly notes that the removal of § 533(b) "will allow telephone companies and cable operators to compete in providing a full range of video, voice, and data services to the public. Such competition can promote investment that expands consumer choices and services." J.A. 370.

The key element in achieving these benefits for the public is the ability of the telephone companies to exercise editorial control as they would undertake to compete in providing such programming, which is nonetheless banned by § 533(b):

> *[M]ere provision of transmission facilities is not sufficient.* [Telephone companies] would still be forbidden to perform the kind of packaging, marketing and publicity functions that are crucial to the success of smaller producers. . . . [H]aving such services available to all producers can make the difference between a film that passes unnoticed and a professional production that serves to challenge people by adding to the *diversity of opinion in the public forum.*

J.A. 326 (at ¶ 12) (emphases added).

Providing consumers and independent video producers with "leased access" cable channels in no way compensates for their lost opportunity to access the extensive programming package that telephone companies could offer in the absence of § 533(b). The FCC's "leased access" requirements make available only one or two channels (at most) of a cable operator's capacity. J.A. 284-85 (Affidavit of Jean Pool ¶ 4). Accordingly, Congress has concluded that "leased access has not been an effective mechanism for securing access for programmers to the cable infrastructure or cable subscribers." H.R. Rep. No. 628, 102d Cong., 2nd Sess. 39 (1992).[8] Even if one or two cable channels were made available to the telephone company or to another video programmer, the bottom line would be that viewers would end up with one (limited) voice simply replacing another, whereas what consumers want — and what they are constitutionally entitled to receive — are additional programming voices.

For all of these reasons, § 533(b) leaves consumers with no adequate alternative means of communication. It is vital that telephone companies be permitted to provide video programming directly to their in-region subscribers. By directly prohibiting this important means of providing "lower prices to viewers, better

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[8] *See also* Donna N. Lampert, *Cable Television: Does Leased Access Mean Least Access?*, 44 FED. COMM. L.J. 245, 248 (Mar. 1992) ("the access provisions of the Cable Act have wholly failed to serve their intended purpose of reducing the bottleneck control of cable operators").

service quality, and better programming diversity," § 533(b) deprives "all users, residential and business alike," of these important benefits. NTIA Reply at 3 (quoted in J.A. 346). It therefore cannot pass muster under the "intermediate scrutiny" standard of constitutional review.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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